LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JUN 24 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 288

HENRY MERSEY & INTERNATIONAL RAILROAD EQUIPMENT CORPORATION,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CORNELIUS J. SULLIVAN
EDWARD F. MYERS
Counsel for Petitioners
19 Milk Street
Boston, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Citation to opinion below	1
Petition for re-hearing	2
Statute involved	2
Jurisdiction	2
Questions presented	2
Statement of the case	4
Reasons for granting the writ	4
Conclusion	9
Appendix A	1a
Appendix B	11a
Appendix C	12a
Appendix D	16a

TABLE OF AUTHORITIES CITED

Cases

Benanti v. *United States*, 355 U.S. 96	9
Carbo v. *United States*, 314 F.2d 718	7
Carus v. *United States*, 295 F.2d 598	7
Goldman v. *United States*, 316 U.S. 129	8
Heath v. *United States*, 209 F.2d 218	6
Palermo v. *United States*, 377 U.S. 953	7
Rathbun v. *United States*, 355 U.S. 107	7
United States v. *Johnston*, 267 U.S. 220	6
United States v. *Laughlin*, 223 F. Supp. 623	8
United States v. *Stephenson*, 121 F. Supp. 274; 223 F.2d 336	8

Statutes

18 U.S.C. § 2	3
18 U.S.C. § 660	3, 6
47 U.S.C. § 605	4, 7
28 U.S.C. § 1254(1)	2
Rules of the Supreme Court of the United States, Rule 22 (2)	2

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No.

HENRY MERSEY & INTERNATIONAL RAILROAD EQUIPMENT CORPORATION,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Henry Mersey and International Railroad Equipment Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on May 25, 1966. (R. 1060).

Citation to Opinion Below

The opinion of the Court of Appeals (R. 1051) is not yet reported. It is printed as Appendix A below, P. 1a.

Petition for Rehearing

A petition for rehearing was filed on June 8, 1966. The petition was denied on June 10, 1966. It is printed as Appendix B below.

The Statute Which the Case Involves

The texts of the statutes which the case involves are set forth in Appendix C. (18 U.S.C. 2, 18 U.S.C. 660, 47 U.S.C. 605)

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1966. P. 11a *infra*, Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The filing of the petition is governed by Rule 22(2) of the Rules of this Court.

Questions Presented

The Petitioners, Henry Mersey and International Railroad Equipment Corporation, respectfully adopt questions 1, 2 and 3 presented in the petition for writ of certiorari of Daniel A. Benson (p. 2) and incorporate the same by reference as part of this petition in addition to the following:

1. Whether monies paid by the individual defendant and the corporate defendant herein to three (3) other co-defendants who were tried jointly with this individual defendant and this corporate defendant, which monies in the words of the Trial Court (R700) in his charge to the jury were "monies

of International Railroad Equipment Corporation" were also monies of a common carrier (Boston and Maine Railroad) within the meaning of the penal statute (18 U.S.C. 660) for violation of which the individual and corporate defendants herein were convicted as aiders and abetters. (18 U.S.C. 2)

2. Whether the rule of strict construction of a penal statute (18 U.S.C. 660) will permit the conviction of the individual and corporate defendants herein for misapplication of certain monies of a common carrier, when the common carrier had neither possession of nor ownership of the monies at the time of the misapplication, but at best only an equitable claim or right, a right to an accounting or some other right accruing to a creditor out of a creditor-debtor relationship.

3. Whether the rule of strict construction of a penal statute permits the conviction of an individual defendant and of a corporate defendant, (the individual defendant being the sole owner of the corporate defendant), for the payment of monies belonging to the corporate defendant to certain officials of a common carrier as kickbacks for their role in arranging and permitting a transaction in which ten (10) cars of the carrier were sold to the corporate defendant herein by the carrier for $250,000, and resold by the corporate defendant to a third party for $425,000.00, and where all but $5,000 of the $71,500 in kickback monies appeared to come from the proceeds of the resale to the third party.

4. Whether incriminating evidence of acts and statements made by the individual and corporate defendants herein and their co-defendants at times prior to August 14, 1958, and admitted into evidence against

the individual defendant and the corporate defendant during trial of the case, when the indictment limited the role of the individual corporation and the corporate defendant herein to aiding and abetting three (3) principal defendants between August 14, 1958 and December 16, 1958, constituted such a variance between the proof and the allegations of the indictment as to affect the substantial rights of the accused defendants herein.

5. Whether in light of a conflict in view among various Circuit Courts of Appeal transcripts of recordings made by one party to certain telephone conversations by means of a device attached to that party's telephone without the knowledge and consent of the accused individual defendant herein, who was the other party to the said conversations, were rendered inadmissable as a violation of 47 U.S.C., Section 605.

Statement of the Case

The Petitioners herein respectfully adopt the statement of the case presented in the petition of Daniel A. Benson, (pp. 3-11) and incorporate the same by reference as part of this petition.

Reasons For Granting the Writ

The Petitioners herein respectfully adopt the reasons presented in the petition for certiorari of Daniel A. Benson (pp. 11-21) and incorporate the same by reference as part of this petition in addition to the following:

I. *The problem of the degree of proprietorship, interest or ownership in the subject matter of misapplication required by the statute.*

Granted as pointed out by the Circuit Court of Appeals (Opinion R———) that, "The statute is not restricted to technical embezzlement but embraces the broad concept of misapplication," the common carrier must still have some degree of proprietary or possessory interest in the subject matter misapplied to satisfy the rule of strict construction of criminal statutes in favor of the accused.

The case was clearly presented to the jury by the Government as one in which $71,500 received by defendants McGinnis, Glacy and Benson from International and Mersey was the subject matter of the misapplication: (R. 43) It was presented to the jury by the Court on the theory that the three principal defendants were corporate fiduciaries who were charged with making personal gains out of the sale and subsequent resale of 10 stainless steel coaches belonging to the Boston and Maine Railroad, the gains to the corporate official being the total sum of $71,500, most of which came from the proceeds of the resale. (R. 683) Later on in the charge, the Court made it specifically clear that the monies paid by Wabash as the purchase price of the 10 cars became the "monies of International Railroad Equipment Corporation". (R. 700)

The reports of this Court and Courts under the supervision of this Court are replete with cases based upon Federal statutes interdicting theft, embezzlement and misapplication of property from a specified category of owner. All such cases seem to require an interest in the subject matter that goes beyond the existence of a creditor-debtor relationship or the duty to account.

For example, in *U.S.* v. *Johnston,* (267 U.S. 220), the defendant had been convicted of embezzling money of the United States in that he had failed to make a return to the Collector of Internal Revenue of the tax upon admission fees for certain boxing matches he had promoted. In affirming a dismissal of charges, Mr. Justice Holmes pointed out that the defendant's relationship to the United States was that of a debtor, not a bailee, and the debtor-creditor relationship was insufficient to support a conviction for embezzlement.

In *Heath* v. *United States,* 209 F. 2nd 318, 9 Cir. 1954, the defendant was convicted of willfully converting and selling property of the United States in violation of Section 641. Inasmuch as it appeared from the record that title to the property converted had already passed to a consignee prior to the act of conversion, the conviction of Heath was reversed on the theory that there was a fatal variance between the allegations of the indictment and the proof.

Only this Court can decide by granting certiorari to what extent a constructive offense can be established under 18 U.S.C. Section 660.

II. *The problem of the admissibility of certain transcripts of telephone conversations in violation of 47 U.S.C. 605.*

Waldo E. Bugbee, a Government witness, testified that on May 14, 1958 (R. 190) and again on June 25, 1958 (R. 199) he was a party to inter-state telephone conversations with the defendant Mersey. The telephone call of May 14 was from Mersey to Bugbee. The telephone call of June 25 was from Bugbee to Mersey.

Bugbee testified further that he had a recording device attached to his telephone (R. 249) and that it was his cus-

tom to record telephone conversations by means of this device that related to "prices and quotations, and to sales and negotiations on equipment." (R. 251) It was a further practice of the office for Bugbee's secretary to make a stenographic transcript of each such recorded conversation and to place each such transcript in the files. (R. 251 and 252) The original discs upon which the telephone conversations were recorded were discarded. (R. 252)

The typewritten transcript of the conversation of May 14, 1958 was admitted into evidence as Government Exhibit 81 and the typewritten transcript of the conversation of June 25, 1958 was admitted into evidence as Government Exhibit 80 (R. 252, 253, 254, 825 and 829) against defendants Mersey and International over appropriate exceptions and motions raising the question of a violation of Section 605 of the Communications Act (47 U.S.C. 605). In affirming the admission of the transcripts, First Circuit Court of Appeals adopted the reasoning of the Court in *Carnes* v. *United States,* 5, Cir., 1961, 295 F. 2nd 598, *Cert. den.* 369 U.S. 861 and held that their admission was in accord with the decision of this Court, in *Rathbun* v. *United States,* 1957, 355 U.S. 107.

Yet Rathbun was decided on the theory that eavesdropping by police officers on a regularly-used telephone extension line was not an unauthorized interception within the meaning of Section 605. Relying upon the Rathbun case some Courts have held recording of a telephone conversation by placing an induction coil next to a home telephone was not an interception within the meaning of the Act, *Carbo* v. *United States,* 314 F. 2nd 718, *cert. denied, Palermo* v. *United States,* 377 U.S. 953. Other courts have held that the recording of a telephone conversation by use of the induction coil and not by direct attachment to the telephone or the telephone line would constitute an intercep-

tion within the prohibition of the Act, *United States* v. *Laughlin,* 223, F. Supp. 623.

None of the fact situations presented in the above cases are determinative of the material facts here. The Mersey-Bugbee conversations were not transcribed by a secretary listening in on an extension line. Nor was a detectophone, induction coil or other device apart and separate from the telephonic system employed to record the conversations. The evidence shows only that there was a direct attachment, a forbidden physical penetration of the communications system. The relevant testimony of Bugbee was as follows: (R. 249)

"Q. Mr. Bugbee, in May and June of 1958 did you have a recording device attached to your telephone?

A. Yes, sir."

The facts in *United States* v. *Stephenson,* 121 F. Supp. 274, Appeal dismissed 223 F. 2nd 336 where defendants' motion to suppress evidence was allowed make a cogent precedent for the matter at bar. In Stephenson, a prosecution for perjury, one Parsons telephoned from his office in California to the defendant in Washington and the two engaged in conversation. Parsons had previously caused to be attached to his telephone instrument a mechanical device which would record conversations. The conversation between Parsons and Stephenson was recorded by means of this device. The defendant had no notice that the conversation was being recorded and did not authorize it. Later, a typewritten transcript of the record was provided to the District Attorney.

Substitute the name Bugbee for Parsons, Mersey for Stephenson, San Antonio for California and Boston for Washington in the above paragraph and the relevant facts of the present case on appeal are presented.

Inasmuch as the rationale adopted by this Court in such cases as *Goldman* v. *United States,* 316 U.S. 129

and *Benanti* v. *United States*, 355 U.S. 96, is that the statute protects the integrity of a telephonic system of communication and that physical penetration of the system and evidence flowing therefrom may not be used to secure a federal conviction, it would appear that the recording by Bugbee of the conversations with Mersey constituted "interception" within the meaning of the Act and the subsequent divulgence of the conversations without the consent of Mersey made them inadmissable against the individual defendant and the corporate defendant herein.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CORNELIUS J. SULLIVAN
EDWARD F. MYERS,
Counsel for Petitioners
19 Milk Street
Boston, Massachusetts

Appendix A

United States Court of Appeals
For the First Circuit

No. 6652.

GEORGE F. GLACY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6653.

DANIEL A. BENSON,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6666.

PATRICK B. McGINNIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Edward O. Proctor for George F. Glacy, appellant.

Claude B. Cross, with whom *John M. Reed* and *Withington, Cross, Park & McCann* were on brief, for Daniel A. Benson, appellant.

Edward F. Myers, with whom *Cornelius J. Sullivan* and *Holtz, Sullivan & Zonderman* were on brief, for Henry Mersey et al., appellants.

William T. Griffin, with whom *Lawrence R. Cohen* and *Newton H. Levee* were on brief, for Patrick B. McGinnis, appellant.

John F. Dougherty, Attorney, Department of Justice, with whom *Donald F. Turner*, Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Howard E. Shapiro* and *Richard A. Wegman*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.

May 25, 1966.

ALDRICH, *Chief Judge.* The defendants, McGinnis, Glacy, and Benson, president, vice-president in charge of finance and accounting, and vice-president in charge of operations, respectively, of the Boston & Maine Railroad, were convicted of misapplying [1] assets of the railroad. Defendants Mersey and International Railway Equipment Corporation, hereinafter collectively, Mersey,[2] were convicted of aiding and abetting. We will deal with the evidence later at more length. Briefly, the government showed that defendant officers presented to the railroad's board of directors a proposal to sell ten stainless steel passenger cars for $250,000, an unreasonably low price, and obtained approval by false statements of what similar cars were selling for; that they caused the cars to be sold for that price to Mersey, the railroad receiving payment only after Mersey had sold to another road which was already committed to buy for $425,000; that Mersey thereafter paid the defendant officers, individually and respectively, $35,000,

---

[1] "[E]mbezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets . . . or willfully or knowingly converts the same to his own use or to the use of another . . . ." 18 U.S.C. §660.

[2] Mersey was the principal officer and representative, as well as sole stockholder of International.

$25,000 and $11,500, or a total of $71,500, much of which was actual proceeds of the sale.[3] All defendants moved unsuccessfully for a dismissal of Count 2 of the indictment, the one on which they were convicted,[4] and for directed verdicts of acquittal for joint and, in most instances, individual reasons. The appeals raise certain further issues.

A basic matter, which defendants presented in various manners,[5] is a supposed distinction between misapplying the cars and misapplying the proceeds. We are unimpressed, as was the district court, whose analysis of the issue and exposition to the jury was a model of simplicity and clarity.

The offense charged was the improper sale at a known inadequate price,[6] to a fraudulent middleman,[7] with defendants' intended acquisition and retention of the proceeds, all part of the one grand design. The statute is not restricted to technical embezzlement, but embraces the

---

[3] The fact that the proceeds could be specifically traced becomes relevant in a later matter, but does not enter into our decision that the offense was made out.

[4] Count 1, after having gone to the Supreme Court, *United States v. Boston & Maine R.R.*, 1965, 380 U.S. 157, was dismissed during trial.

[5] The defendants' attacks on the indictment, demands for particulars, motions for acquittal and a number of their refused requests for instructions, directly or indirectly raised this issue.

[6] It is this aspect of the case that distinguishes it from the state decisions cited by the defendants. We agree that the agents there entrusted to sell property, whether potatoes, watermelons, bonds, stock, automobiles, or spreaders, could not be convicted of conversion of the proceeds on a charge of converting the property. In those cases the sales were fully authorized. In the case at bar if defendants' only misconduct had been to intercept and pocket proceeds of an honest sale, the present indictment would have been inappropriate. But that is not this case. The defendants were charged with a larger offense. The district court's instruction laid this issue on the line.

> "If what these defendants did was bad judgment in selling the cars at the price for which they sold them, or was stupidity and nothing more, then they are not responsible. They have a wide degree of latitude in the exercise of their judgment. But will-

broader concept of misapplication. *Cf. Batchelor* v. *United States,* 1895, 156 U.S. 426; *United States* v. *Mulloney,* D. Mass., 1934, 8 F. Supp. 674, *aff'd,* 79 F.2d 566, *cert. den.* 296 U.S. 658; *Kramer* v. *United States,* 4 Cir., 1951, 190 F.2d 712, 717-18. The defendant officers committed one underlying offense, violative of the statute, whether their action is sought to be broken down as depriving the railroad of the cars for less than they were worth, to their individual advantage, or as pocketing proceeds which, in law, belonged to the railroad.[8]

The indictment fully sets out the statutory offense and the basic facts charged, so that neither the grand jury nor the defendants were misled. Count 2 of the indictment charges one offense, and the evidence abundantly supports it, unless there was some error as to its admission.

The defendants duly objected to the court's instruction to the jury, near the end of the government's case, that it was warranted in considering all the evidence against all the defendants. This raises the question whether sufficient concert among them was independently shown. *Lee Dip* v. *United States,* 9 Cir., 1937, 92 F.2d 802, *cert. den.* 303

---

fulness means that they intended to do what they did, and did it voluntarily, and with a specific intent, or bad purpose, the bad purpose being to line their own pockets at the expense of the Boston and Maine."

The statement, made in oral argument by one of the defendants, that the "court put to the jury that the only question was whether the defendants converted the money," if the charge is taken as a whole is simply not so.

[7] Mersey, because he took title, objects to being described as a middleman. It is clear on the government's evidence, however, that the cars passed through him as part of the original scheme, in order to siphon off what rightly should have gone to the railroad.

[8] For this latter reason cases such as *Heath* v. *United States,* 9 Cir., 1954, 209 F.2d 318, and *Golden* v. *United States,* 1 Cir., 1963, 318 F.2d 357, are inapposite. In *Heath* it conclusively appeared that the property had ceased to be government property before it was converted. In *Golden* the question was whether the property misapplied by the defendant had been delivered to him in his capacity as officer of the bank, or as a fiduciary for another.

U.S. 638; *United States* v. *Olweiss*, 2 Cir., 1943, 138 F.2d 798, *cert. den.* 321 U.S. 744.

Evidence introduced by the government and independently admissible, disclosed the following. In 1957, prior to the sale of the ten passenger cars, the railroad had sold two stainless steel dining cars to Bugbee, a Texas dealer in used railway equipment. Throughout this prior transaction the railroad acted through its employee, Bolton, who was the one regularly in charge of such matters. Bugbee resold the cars to the Wabash Railroad. All of these facts were known to all of the officer defendants. On April 30, 1958 [9] Bugbee saw Bolton in Boston and indicated an interest in the passenger cars. Bolton replied that they were in use and not for sale. However, on request, he took Bugbee to Glacy. Bugbee inquired if he could have an option to purchase the cars for $500,000. Glacy refused. On April 29 Glacy had received from Benson, the defendant officer in charge of such matters, a current list of equipment available for sale. These cars were not on it. We now recite, under each defendant's name, evidence admissible at least against the stated defendant.

Mersey

Mersey's files contained a copy of Benson's "for-sale" list, dated, in Mersey's handwriting, April 30. On it was written in Mersey's handwriting, "add ten stainless cars," with a notation that Mersey was requesting prints. On May 10, after calling several times previously, Mersey reached Bugbee on the telephone, introduced himself, said he "owned" the ten cars, and offered to split with Bugbee whatever the latter could realize above $500,000. On June 25 Mersey telephoned Bugbee and reported that McGinnis had complained to Mersey that Wabash had tried to deal

[9] Unless otherwise noted, all dates refer to 1958.

directly with McGinnis. Mersey stated that he had the situation in hand, and that he had told McGinnis so. Bugbee reported, in the same conversation, that Wabash would not pay more than $500,000. On July 17 Bugbee informed Mersey that Wabash's top price was $425,000.

The sale was voted on July 23, and consummated August 14. Between August 13 and December 16, Mersey made payments to the defendant officers totalling $71,500.

Glacy

Glacy, in early June, informed Bolton that the sale of the ten cars would not be handled by Bolton, but by Mersey. Bolton objected that it was his job, and raised Bugbee's prior interest. Glacy told Bolton that McGinnis wanted it handled this way. On June 26, the day after Bugbee had told Mersey that Wabash's top price was $500,000, Glacy stated in an office memorandum seeking Benson's pricing of the cars, that similar cars had been bought from the New York Central by Seaboard Airline for $20,000 to $22,000 after it had been "practically ready to buy these coaches from us." In fact Seaboard had not been practically ready, had bought nothing from New York Central, and had bought cars, the nature of which did not appear, from the C & O for $84,000. On July 18, the day after Bugbee had told Mersey that Wabash's top figure was $425,000, Glacy informed Benson by office memorandum that he had an offer of $250,000, and requested Benson's approval. When the sale was consummated Glacy, upon releasing the cars, accepted a personal check post-dated by eight days. It was customary to require a certified check. The personal check exposed the railroad to serious risk. Mersey was already indebted to the railroad in the amount of $75,000 for a longer time than it was customary to permit, and had a bank balance of only $30,000.

Glacy received and collected payments on two checks, $12,500 each, drawn by Mersey on August 22 and 29.

Benson

Benson took Mersey to Bangor on April 30, the railroad paying the air fare. Since no railroad reason for Mersey's trip has been suggested, this indicates, at the least, some intimacy between Benson and Mersey. Benson's retained office copy of his "for-sale" list had a note attached stating that prints of the ten cars had been given Mersey on May 1. Benson, whose duties related to the sale and purchase of equipment, and who could be expected to be knowledgable, in giving Glacy a price of $30,000 on June 30, accepted Glacy's gross misstatement of the New York Central price. When Glacy, by subsequent memorandum, asked approval of $25,000 a car, Benson replied affirmatively, stating the cars were going to require heavy overhaul, at a cost of $25,000 apiece.

Benson received and collected payment on three checks drawn by Mersey on August 13, October 9, and December 16, for $5,000, $1,500, and $5,000, respectively.

McGinnis

It was McGinnis' custom, as president, to review the agenda for the directors meeting beforehand. The memorandum presented to the July 23 meeting requesting a vote on the sale of the ten cars did not name the buyer. Nor did it name the railroad officials who were endorsing the sale, but merely stated that it was recommended by "management." These lacunae were both contrary to standard practice. The sale was unanimously voted. In January 1962, McGinnis told an ICC investigator that he had been the one to present the sale to the directors. On the stand he denied this. Glacy and Benson were not directors, and if McGinnis had not sponsored the sale it does not appear who did.

McGinnis received and collected payment on three checks drawn by Mersey—two on October 10, each for $10,000, and one on December 3, for $15,000.

Each officer defendant took the stand and admitted, and sought to explain, receipt of the payments charged to him. Benson testified that his payments were for information and advice allegedly given Mersey in connection with other property Mersey had considered buying from the railroad. In making this explanation Benson, at the least, implicated himself as sufficiently intimate with Mersey to sell him information in clear breach of his fiduciary obligations to his employer.

Glacy testified that his two checks represented two years' salary for consulting services rendered to Mersey. The checks, ostensibly a week apart, were actually contiguous in the checkbook. On Glacy's testimony they represented a payment of the first year's salary nearly eight months later, and of the second year's salary four months prior to the end of the year. Furthermore, Glacy had previously received from Mersey appropriate compensation for the first year's salary, assuming it was earned at all. As against Glacy's testimony, in January 1962 he had told an ICC inspector that he had never received payments of any description from Mersey or his company.

McGinnis testified that his payments from Mersey had been for services in connection with a transaction referred to as the Schiavone loan. The loan never went through. In January 1962 McGinnis told an ICC inspector that he had never received any payments from Mersey or his company, and specifically, that he had not received $35,000, and that although he had worked on the Schiavone loan, it had not materialized and he had received no fee. There were additional inconsistencies of record in McGinnis' courtroom explanations.

Mersey did not take the stand. His company records showed the various payments, but inconsistently with some of the defendant officers' testimony.

In sum, it could properly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars. Among other things, Glacy grossly misstated the circumstances of supposedly similar cars being bought by the Seaboard Airline; Benson, within whose expertise such matters lay, acquiesced in his statement, and in the price at which the Boston & Maine cars were ultimately sold; and McGinnis presented the matter of the sale to the board of directors in a significantly unorthodox manner. Even if there were merit in the defendant officers' contention that there was no direct evidence that any of them conspired with each other, a contention which leaves a number of matters unanswered, there was clear evidence that each conspired with Mersey. It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements. The court's ruling was amply supported.

Only one further matter merits mention. Some of the testimony damaging to the defendants came from Bugbee, whose accounts of his telephone conversations with Mersey were reinforced by introduction of transcripts of recordings made by Bugbee without the knowledge, and hence consent, of Mersey. Defendants say that the transcripts are rendered inadmissible because their divulgence would violate 47 U.S.C. § 605, the arguably pertinent portion of which reads,

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish

> the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person . . . ."

We agree with the reasoning of the court in *Carnes* v. *United States*, 5 Cir., 1961, 295 F.2d 598, *cert. den.* 369 U.S. 861, holding the transcripts admissible. This result accords not only with the decision of the court in *Rathbun* v. *United States*, 1957, 355 U.S. 107, but, we believe, with the minority opinion as well.

Affirmed.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6662.

HENRY MERSEY ET AL.,
Defendants, Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

JUDGMENT
May 25, 1966

This cause came on to be heard on consolidated appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgments of the District Court are affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
ROGER A. STINCHFIELD
Clerk.

[cc: Messrs. Myers and Shapiro.]

Appendix C

United States Court of Appeals
For the First Circuit

No. 6662.

HENRY MERSEY ET AL.,
DEFENDANTS, APPELLANTS,

v.

UNITED STATES OF AMERICA,
APPELLEE.

PETITION FOR REHEARING

Now come the defendants, appellants Henry Mersey and International Railway Equipment Corporation and petition the Honorable Court for a rehearing of the above-captioned case, predicated on the judgment and opinion of this Court entered on May 25, 1966. In support of this Petition, the defendants, appellants Mersey and International assign the following grounds:

1. In its opinion the Court stated at page 3 that it was unimpressed with the "supposed distinction between misapplying the cars and misapplying the proceeds". The Court went on to say that "the offense charged was the improper sale, at a known inadequate price, to a fraudulent middleman, with defendants' intended acquisition and retention of the proceeds, all part of the one grand design".

It would appear that this Court has sustained the conviction of the defendants, appellants Mersey and Interna-

tional for aiding and abetting in the misapplication of ten railway cars of the Boston & Maine Railroad when in fact the alleged offense submitted to the jury for their consideration was the misapplication of $71,500, allegedly part of the proceeds from the resale of the same ten railway cars by International to a subsidiary of the Wabash Railroad.

The government in its opening to the jury (R. 43) specifically elected to proceed with the case of the theory that the "$71,500 . . . rightfully and legally belonged to the Boston & Maine Railroad". Later on, the trial court instructed the jury (R. 700) that on all the evidence title to the ten cars passed from Boston & Maine to International and then from International to the Wabash subsidiary. The trial court further charged that the money paid by the Wabash subsidiary "became the monies of International Railway Equipment Corporation".

In view of the constitutional requirement that defendants be adequately apprised of the offense with which they are charged and especially in view of the case of *Russell* v. *U.S.*, 369 U.S. 749 (1962) it would appear that justice may require a further consideration of this issue.

2. At page 9 of its opinion, the Court stated that "it could possibly be found that each of the defendant officers consciously acted to facilitate the improper sale of the cars". Neither defendant Mersey nor International were officers of the common carrier whose cars were allegedly misapplied. These two defendants were charged only with aiding and abetting the three principal defendants. It would indeed be impossible for Mersey and International to be convicted of the substantive offense outlined in Section 660 unless they were officers of a common carrier. They have instead been charged with aiding and abetting the other defendants. In order to convict Mersey and International it was necessary to raise them from the level of aiders and

abettors to that of co-conspirators. In the absence of a count charging the substantive crime of conspiracy it is possible to convict on a joint venture theory for the commission of a substantive offense (*U.S.* v. *Olweiss*, 138 F.2d 798, cert. denied, 321 U.S. 744), but the question remains open as to whether an aider and abettor, two steps removed from the substantive offense, can be convicted under the same theory.

3. On page 4 of its opinion, the Court said that "the proceeds . . . in law belonged to the railroad", and in a foot note on the same page, "it is clear . . . that the cars passed through him (Mersey) as part of the original scheme in order to siphon off what rightly should have gone to the railroad . .", the above referring to the total of $71,500 which was paid over by International to the three principal defendants. Yet the record is barren of any evidence offered by the government to prove that McGinnis, Glacy and Benson received their payments in their capacity as corporate officers of the Boston & Maine or otherwise. While the jury was free to believe or disbelieve the testimony of the three officers, it was not free to make a finding of fact that the contrary of the statements given in testimony by the three corporate officers was true in the absence of even a scintilla of affirmative evidence offered by the Government. Under the reasoning of *Golden* v. *United States*, 318 F.2d 357, it would appear that the capacity in which the three officers received the payments would have to be supported by evidence, beyond the fact of the payments themselves.

4. In its opinion at page 9, the Court adopted the reasoning of *Carnes* v. *United States*, 5 Cir., 1961, 295 F.2d, 598, cert. den. 369 U.S. 861 with respect to the admissibility of transcripts of telephone conversations between Mersey and Bugbee, holding that the transcripts were not rendered inadmissible as a violation of 47 U.S.C. 605. We would respectfully submit that the facts in *Carnes* are

different enough to warrant rehearing on this issue since in Carnes there did not appear to be the extent of physical penetration of the means of communication required under the decisions of *Goldman* v. *United States,* 316 U.S. 129, 133 and *Benanti* v. *United States,* 355 U.S. 96, 100.

For all of the above reasons we submit that this Court should grant a rehearing on this case.

Respectfully submitted,

CORNELIUS J. SULLIVAN

EDWARD F. MYERS
19 Milk Street
Boston, Mass. 02109
Attorneys for the Defendants, Appellants

CERTIFICATE

We, Cornelius J. Sullivan and Edward F. Myers, counsel for the defendants, appellants Henry Mersey and International Railway Equipment Corporation, certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

CORNELIUS J. SULLIVAN

EDWARD F. MYERS

Appendix D

TITLE 18, UNITED STATES CODE SECTION 2

2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

TITLE 18, UNITED STATES CODE SECTION 660

660. Carrier's Funds Derived From Commerce; State Prosecutions

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motor truck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken

or had possession of such moneys, funds, credits, securities, property, or assets.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts. June 25, 1948, c. 645, 62 Stat. 730.

TITLE 47, UNITED STATES CODE SECTION 605

605. Unauthorized Publication Or Use Of Communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance,

purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI 605, 48 Stat. 1103.